INTERIOR BOARD OF INDIAN APPEALS

Estate of Fannie Newrobe Choate

6 IBIA 144 (09/09/1977)

Related Board case:
7 IBIA 171
Affirmed, *Sherman v. Andrus*, No. CV-79-73-GF (D. Mont. July 20, 1981)

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

ESTATE OF FANNIE NEWROBE CHOATE

IBIA 77-41 Decided September 9, 1977

Appeal from an order denying petition for rehearing.

Reversed.

1. Indian Probate: Hearing: Notice

   Agency Superintendents are required to furnish all wills in their custody to the Administrative Law Judge upon the maker's death, not only the latest will, since a decedent's purported last will and testament shall not be deemed valid "unless and until it shall have been approved by the Secretary of the Interior." 25 U.S.C. § 373. Accordingly, the term "each party in interest" to whom specific notice of hearing is required by 43 CFR 4.211(b), should include all devisees of all wills of a decedent which are in the Superintendent's custody at decedent's death, as well as decedent's heirs at law.

2. Indian Probate: Rehearing: Generally

   But for certain errors committed by the Superintendent's office, appellant would have perfected a proper request for rehearing. In the interest of justice, the extenuating circumstances in this case compel a finding that appellant filed a petition for rehearing not having been rejected--was acceptable.

Appearances: D. Patrick McKittrick, Esq., McKittrick & Duffy, Great Falls, Montana, for appellants.

OPINION BY ADMINISTRATIVE JUDGE HORTON

This is an appeal from an Order Denying Petition for Rehearing 1/ issued by Administrative Law Judge Keith L. Burrowes on January 20, 1977. Appellants are Helen Edmo Sherman, Jack Edmo, Vincent Spotted Bear, Roy (Archie, Jr.) St. Goddard and Mary Newrobe Redhead, who purportedly are named devisees in a 1973 will of the deceased which, it is alleged, was improperly excluded from probate.

I. Background

Fannie Newrobe Choate, deceased Blackfeet Allottee No. 87, died testate on May 31, 1975, at age 91. Administrative Law Judge Frances C. Elge (now retired) issued a Notice of Hearing to Determine Heirs or Probate Will on May 19, 1976, in which a probate hearing was announced for June 22, 1976, at the Blackfeet Indian Agency, Browning, Montana. The foregoing notice referred to only one will of the deceased dated December 6, 1974, as subject to probate at the scheduled hearing. In addition to being posted at four area U.S. Post Offices and the Blackfeet Indian Agency as required by regulation, copies of the notice of hearing were mailed to the following persons and no others: Jeanette Choate Marceau and Edith Biglodgepole Caril, adopted daughters of the deceased and her only heirs at law; Marisha Ironpipe Hall and Faye L. Hoyt, witnesses to testatrix's 1974 will; and Helen Sherman, niece of the decedent and one of the appellants herein.

Jeanette Choate Marceau is the sole devisee in testatrix's 1974 will and she was the only party to appear at the June 22, 1976 hearing. An Order Approving Will and Decree of Distribution was issued by Judge Elge on August 25, 1976, in which approval was given to decedent's last will and testament dated December 6, 1974. None of the appellants was listed as addressees in the notice of decision sent by Judge Elge on August 25, 1976, presumably because they were not considered by the Judge to be interested parties.

The sequence of events occurring subsequent to the order approving will is in dispute. Appellants alleged in their petition for rehearing or reopening and in their appeal to the Board that Helen

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1/ The petition filed by appellants with the Administrative Law Judge was styled as a petition for rehearing or reopening. Our regulations do not provide for submission of a joint petition for rehearing or reopening. Requests for rehearing and reopening are governed by different requirements. See 43 CFR 4.241 and 4.242. Parties aggrieved by a probate decision of an Administrative Law Judge are entitled to petition for rehearing within 60 days after notice of such decision. It is only after this period that a petition to reopen an estate would be appropriate.

Sherman, acting in her own behalf and that of all appellants, was prevented from filing a technically correct appeal from Judge Elge's order approving will due to dereliction of duty by the Superintendent of the Blackfeet Indian Agency. 2/ In short, Helen Sherman claims that she sent a document to the Superintendent on October 4, 1976, following a conference with him on October 3, which set forth her objection to the order approving will. 3/ Although the record shows that the Superintendent reports no such document as being received, the case file does establish that on October 18, 1976, the Superintendent's office received a letter from Helen Sherman thanking the Superintendent "for the opportunity to appeal the Fannie Choate case." There is no evidence that the Superintendent's office responded to the foregoing letter or took steps to inform her that it lacked any record of prior correspondence relating to an appeal of the Fannie Choate estate. Neither was the letter forwarded to the Administrative Law Judge. 4/

In November 1976 Helen Sherman obtained the assistance of legal counsel. By this time the 60-day period for filing a request for rehearing had expired. Nevertheless, through counsel appellants herein filed a Petition for Rehearing, Reopening and Suspension of the Distribution of the Estate on January 10, 1977, which detailed the attempts by Helen Sherman to effect an appeal of the order approving will, referred to the existence of a purported prior will of the deceased, and alleged the invalidity of decedent's 1974 will.

By order dated January 20, 1977, Administrative Law Judge Keith Burrowes, successor to Judge Elge, denied appellants' petition for rehearing for lack of timeliness. The petition to reopen, plead in the alternative, was denied because it was not shown that such request

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2/ A technically correct appeal would have been a "petition for rehearing" which followed the content and time requirements of 43 CFR 4.241(a).

3/ It is a matter of record that on August 28, 1976, Helen Sherman sent a letter to this Board which expressed her desire to appeal Judge Elge's decision. On September 2, 1976, we responded to this letter by advising Helen Sherman that she had until October 26, 1976, within which to file a petition for rehearing with the Superintendent of the Blackfeet Agency. The October 4 letter (Exh. 2 of Appellants' Brief) appears to raise at least one reviewable objection to the 1974 will, contrary to its characterization at p. 2 of the order denying petition, to wit: that one of the two attesting witnesses bore a relation to the sole beneficiary. (See, however, Estate of Ah-Teel-Thley, IA-1 (May 19, 1950).)

4/ 43 CFR 4.241(a) provides that the Superintendent, upon receiving a petition for rehearing, shall promptly forward it to the Administrative Law Judge.

was made by an interested party "who had no actual notice of the original proceedings and who was not on the reservation or otherwise in the vicinity at any time while the public notices of the hearing were posted * * *," as required by 43 CFR 4.242(a).

On March 16, 1977, appellants' counsel filed a timely appeal from Judge Burrowes' order which is the subject of this decision. In addition to the claims made in their petition to the Administrative Law Judge, appellants allege on appeal, and it appears to be the case, that Jack Edmo, nephew of the deceased who was a devisee in her purported prior will, received no actual notice of the original probate hearing and could not have received constructive notice thereof as he has been a resident of Ft. Hall, Idaho, since August 1975.

II. Findings and Conclusions

This case presents an unusual set of circumstances which we believe justifies a remand for further proceedings. Foremost, the Board is disturbed over the fact that the probate record furnished us does not contain a copy of the purported will of the deceased dated August 3, 1973. That such a will apparently exists is beyond doubt since it is listed in the Data for Heirship Finding and Family History prepared by the Bureau of Indian Affairs on April 27, 1976, prior to the hearing, and the appellants' brief cites specific devises made in the will. In addition, appellants assert in their appeal, as they did in their petition, that the 1973 will is on file in the case (Notice of Appeal, p. 1).

Although Judge Elge specifically incorporated the Bureau's Data for Heirship Finding in her order approving will (at p. 1), there was no mention of the 1973 will in either the notice of hearing, the transcript of proceedings or her decision.

[1] Pursuant to 43 CFR 4.210, the Agency Superintendent is required to forward to the Administrative Law Judge "the original and copies of all wills in the Superintendent's custody, if any; and any paper, instrument, or document that purports to be a will." The obvious reason for requiring all wills to be furnished to the probate judge stems from the fact that a decedent's purported last will and testament shall not be deemed valid "unless and until it shall have been approved by the Secretary of the Interior." 25 U.S.C. § 373. Accordingly, the term "each party in interest" to whom specific notice of hearing is required by 43 CFR 4.211(b) should in every case include all devisees of all wills of a decedent which are in the Superintendent's custody at decedent's death, as well as decedent's heirs at law.

From the record as a whole, we believe sufficient grounds were made known to the Administrative Law Judge from which it would have been appropriate for him to order a rehearing or reopening. As

already noted, the evidence strongly suggests that with the exception of Helen Sherman, each of the appellants was improperly excluded from actual notice of the probate hearing. 5/ This exclusion was cited in the petition filed with the Administrative Law Judge (at paragraph VI). Further, although substantiation of appellant Jack Edmo's absence from the vicinity of the hearing was not revealed to the Administrative Law Judge until after he ruled on appellants' petition, it may have been appropriate for the Judge to treat such documentation as a separate and valid reopening request. 6/

[2] Finally, we think that but for certain errors committed by the Superintendent's office, Helen Sherman would have perfected a proper request for rehearing in October 1976. For example, her letter concerning an appeal which the Superintendent acknowledged receiving on October 18, 1976, was filed well in advance of the deadline for submission of a petition for rehearing. As a minimum, we believe the Superintendent had a responsibility to advise Helen Sherman that his office had not received a document from her which could be considered a petition for rehearing. Such minimal action would have allowed her to submit the proper papers. In the interest of justice, such extenuating circumstances compel a finding that Helen Sherman filed a petition for rehearing which, not having been rejected, was acceptable. See, in comparison, Estate of James Andrews White, a/k/a James P. Andrews, 6 IBIA 79 (decided May 24, 1977) where we ruled that when an extension of time request was sent to the wrong office for filing on account of incorrect advice from Bureau personnel who are responsible for knowing right procedures, the Department should be precluded from denying such request on grounds that it was not filed at the proper place.

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5/ Although Helen Sherman received notice of the hearing, the notice gave her no indication that she was a devisee in a will of the deceased. It is not unreasonable to presume that if such fact had been made known, she may have attended the hearing or retained counsel to contest the other will. Likewise, charging any of the appellants with constructive notice of the hearing would be meaningless; without specific knowledge that they were devisees in a will of the deceased, and not being heirs at law, why should they be expected to attend the hearing?

6/ Appellants' brief on appeal in fact characterizes Jack Edmo's correspondence to Judge Burrowes, dated February 17, 1977, as a petition to reopen although on its face the letter is not labeled as such. In certain cases our Department has treated informal correspondence as satisfying technical requirements for a petition to reopen where to do so would correct an injustice. See Estate of Opie Samuel Bordeaux, Sr., 5 IBIA 24 (decided February 10, 1976); Estate of David Marksman, 5 IBIA 56 (decided March 29, 1976).

For all of the foregoing reasons we believe appellants are entitled to a new hearing in this estate at which time they may seek to prove the invalidity of decedent's 1974 will, as alleged, and the validity of any other purported will of the deceased. The request for attorney's fees made by appellants' counsel stands contingent on the outcome of the new hearing.

NOW, THEREFORE, by the virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the January 20, 1977 Order Denying Petition for Rehearing (and Reopening) issued by Administrative Law Judge Keith L. Burrowes is REVERSED and the matter is REMANDED to the Administrative Law Judge to conduct proceedings consistent with this decision.

This decision is final for the Department.

Done at Arlington, Virginia.

//original signed
Wm. Philip Horton
Administrative Judge

We concur:

//original signed
Alexander H. Wilson
Chief Administrative Judge

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Mitchell J. Sabagh
Administrative Judge